Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Sections 12 and 19	)	
of the Cable Television Consumer	)	
Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and	)	
Diversity in Video Programming	)	
Distribution and Carriage	)	

To: The Commission

OPPOSITION OF SUPERSTAR CONNECTION
TO PETITION FOR RECONSIDERATION

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I. Introduction and Summary

Superstar Connection participated in the rulemaking in which the Commission adopted new program access rules implementing Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), 47 U.S.C. § 628. Superstar is a "satellite broadcast programming vendor" within the meaning of Section 19 of the 1992 Cable Act, and Section 1000(g) of the Rules. 47 C.F.R. § 1000(g). Superstar uplinks and distributes four superstations and other services by satellite throughout the country to properly authorized C-band TVRO satellite dishes. Superstar sells directly to the home satellite dish ("HSD") owners possessing residential TVRO earth station facilities. Superstar also sells directly to HSD owners by way of a number of agents and commissioned salesmen, including equipment dealers, equipment distributors and third party program packagers.3/

[Footnote Continued]

Cable Television Consumer Protection and Competition Act of 1992: Implementation of Competition and Diversity in Video Programming Distribution and Carriage, FCC 93-178 (released Apr. 30, 1993)("Report and Order").

3/ United Video, Inc., a commonly owned corporation, sells these superstation services to cable operators and to other facilities-based multi-channel distributors that own commercial TVRO facilities. United Video is filing separately with respect to the various petitions for reconsideration.

The terms and conditions by which Superstar distributes its superstation programming will now be subject to the Commission's new program access rules. As initially envisioned in the Commission's Notice of Proposed Rulemaking, the Commission sought to analyze and regulate the satellite distribution of programming in a manner most consistent with competition and market-based realities. Despite persuasive and well-reasoned comments filed by programming vendors indicating that a drastic rearrangement of program access and pricing relationships would significantly disrupt the multichannel video programming market, the Commission has sought to implement rather strict price regulation.[4/]

Many of the issues raised on reconsideration by the programming suppliers merit further review. Moreover, NRTC aptly characterized as the programmers' nemesis, surprisingly petitioned for reconsideration although it is likely it will profit significantly at the program vendors' and satellite carriers' expense. It now is appropriate for the Commission to rethink some of the issues decided in favor of future complainants such as NRTC, revisit the business and technical issues raised by the

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4/ Congress told the Commission to "rely on the marketplace, to the maximum extent feasible, to achieve the goal of increasing availability of programming to the public." 1992 Cable Act, § 2(b)(2). The Commission initially expressed its general agreement with this principle, determining to allow marketplace forces to operate whenever possible. NPRM ¶ 12. However, between the time of the NPRM and the Report and Order, strict price regulation has taken hold.

petitioners, and re-evaluate the standards for what will be the very large number of complaint proceedings guaranteed to arise out of the Commission's program access rules.

First, the Commission should expressly recognize a more relaxed treatment for superstation carriers. Second, the Commission should reconsider, as suggested by the various petitioners, that complainants alleging violations of 47 C.F.R. § 1002 must, in all instances, establish that they have been harmed before being permitted to continue with a complaint proceeding. The Commission should reaffirm its intent to deny damages as an item of recovery -- especially if no harm need be shown by the complainant -- and allow for prospective amendments of contracts as the only sensible remedy. Finally, the Commission should strengthen the protection against disclosure of confidential information.

II. Superstation Programmers' Practices Should Be Treated More Deferentially

Superstation programming possesses many significant differences from satellite cable programming. First, Superstar's programming is available and marketed to every type of multichannel video distributor, and not just to cable television systems. Over 30 million cable, SMATV, and MMDS subscribers, and almost one million HSDs subscribe to Superstar's (and United Video's) four superstations. These superstations are "available" to every single television household in the country.

The evils which Congress sought to eliminate with the program access provisions of the 1992 Cable Act were vertical favoritism (for cable), and the perceived attendant restraint on competition, and restrictions on distribution of programming via competing technologies. However, Superstar has never restrained competition or "favored" cable; indeed, three out of four of Superstar's superstations have higher penetration and subscribership in the HSD market than in cable, SMATV or MMDS combined. Nonetheless, because all superstation programming vendors now will be price regulated (as opposed to only the vertically integrated cable programming distributors) there will be a significant anomaly in the implementation and enforcement of the program access rules: all superstation programmers will be treated as if they had the same motivation to discriminate that Congress attributed to vertically integrated non-superstation programmers.

The Commission can rectify this anomaly by confirming in the Rules its previous finding in the Report and Order that satellite broadcast programming vendors face a unique, artificial ceiling on program prices, as well as comparative ease of entry for potential competitors seeking to offer the same signal.

> [W]e believe that certain practices involving price differentials benefit the public by increasing the availability of programming -- as well as reducing the price of service -- to consumers. For instance, we conclude that our rules must allow for fundamental differences in pricing of satellite cable programming as opposed to

> satellite broadcast programming, because satellite broadcast programming vendors face a unique, artificial ceiling on program prices as well as comparative ease of entry barriers for potential competitors seeking to offer the same signal.

Report and Order, ¶ 100 (footnote omitted). Although the Commission expressly recognized this issue in the Report & Order no difference in treatment was included in the new Rules.

NRTC, in its Petition for Reconsideration,[5/] has asked the Commission to eliminate the finding in the Report & Order and thus ignore the facts that (a) there are 16 superstations currently competing for essentially two available slots on cable systems, (b) 13 of the 16 superstations principally serve the HSD market, and (c) anyone can enter the superstation distribution business by simply investing the necessary money in a receiving antenna, up-link and transponder. The Commission should conform its rules to the Report and Order and require, at a minimum, that any entity complaining of discrimination by a satellite broadcast programming vendor demonstrate that it in fact has been harmed before it attains standing to bring a complaint. The Commission also should clarify in a second note to 47 C.F.R. § 76.1002(b)(2) or § 1003 that superstation pricing differentials are presumed lawful and a complainant, to succeed in showing a violation of

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5/ In its Comments earlier in the proceeding, NRTC was joined by the Consumer Federation of America ("CFA"). However, CFA apparently has decided not to participate with NRTC in petitioning for reconsideration.

the anti-discrimination rules, must demonstrate that it either has lost subscribers to the "favored" competitor, or, that the programmer intended to harm the complainant through the alleged discrimination. This clarification would recognize that superstation programmers have no motive nor intent to discriminate, distribute their programming widely already, and face inherent marketing and business differences in the superstation market. This approach would allow competitive forces to control pricing in most instances.

NRTC also forgets the purpose of § 19. Section 19 is not intended to increase NRTC's, or any other HSD distributors', profit margins; it is to insure that in the absence of competi-

without merit. Moreover, the Commission should conform its rules to the findings in the Report & Order and allow for "fundamental differences in pricing" for superstation programming.

III. The Commission Has Not Prejudged the Legality of Any Rate Differentials

The Commission correctly noted that serving HSDs, either directly, or through distributors, is more costly than serving subscribers by way of other technologies. Report & Order ¶ 106. NRTC takes issue with the Commission's effort to properly identify these additional costs, fearing the Commission has "prejudged" this issue. NRTC's fears are miscast; NRTC simply wants the Commission to exclude the cost differences without reference to either market or business realities.

The regulations allow for price differentials based on "actual and reasonable differences in the cost of creation, sale, or delivery or programming" as well as differentials attributable to "economies of scale, cost savings or other direct and legitimate economic benefits that are reasonably attributable for the number of subscribers served." 76 C.F.R. § 1002; Report & Order ¶¶ 106, 108. These cost factors appear susceptible of objective measurement. However, the difficulty in identifying all appropriate "cost" and "economic benefit" factors preclude any objective measures. Moreover, because these actual differences are only one factor in determining prices, the Commission properly

did not restrict normal business decisionmaking processes in the regulations based on differing market conditions.

For example, the Commission rejected the requirement that programmers file rate cards so they could "preserv[e] a degree of flexibility for each vendor's sales preferences that might result from the unique nature of each programming service." Report & Order ¶ 112. Moreover, the Commission recognized other business realities in finding that

> the record reveals the distributors will have distinguishing attributes based upon the technology they employ, the number of subscribers they serve, and their ability and willingness to provide various secondary transactions and services to the vendor in exchange for programming. To the extent that these factors can be justified by the vendor on a case-by-case basis, we believe that our adopted approach will serve the public interest..."

Id. at ¶ 103. Furthermore, on NRTC's precise argument, the Commission recognized that program distribution is not technology neutral.

> We agree with those commenters suggesting that the record in this proceeding supports the preliminary conclusion in this Notice that service to HSD distributors may be more costly than service to others using different delivery systems such as cable operators, as additional costs are often incurred for advertising expenses, copyright fees, customer service, DBS Authorization Center charges, authorization center charges and signal security. The Record indicates that these cost differences are particularly evident when providing programming services to HSD distributors who do not provide a complete distribution path to individual subscribers. Report & Order ¶ 106 (footnote omitted).

Specifically, the "actual and reasonable" differences in "cost" include:

> (1) considerably more marketing costs for the HSD market, which benefit all distributors regardless of their operations, as such costs encourage consumer awareness and desire for programming;
>
> (2) substantial copyright liability imposed on the satellite carriers for HSD distribution only;
>
> (3) more and different "back office" costs considering the fact that thousands of authorizations and consumer problems must be dealt with on an hourly basis, 24 hours a day;
>
> (4) the cost's of General Instruments DBS center, port and connections, as well as the separate VSAT system connecting the DBS center with the programmers' uplinks; and
>
> (5) the substantial costs associated with the detecting, eliminating and preventing piracy, including forward security costs.

The Commission recognized these costs as well in the note to 47 C.F.R. § 1002(b)(2):

> Vendors may base price differentials, in whole or in part, on differences in the cost of delivering a programming service to particular distributors, such as differences in cost, or additional costs, incurred for advertising expenses, copyright fees, customer service, and signal security. Vendors may base price differentials on cost differences that occur within a given technology as well as between technologies.

Clearly, the Commission has not "prejudged" these costs, but has left it to the carriers to prove them. NRTC clearly believes that none of these costs benefit it as a "wholesaler" but only the particular programming vendor's "retail" operations.

However, NRTC ignores the fact that these costs are actually incurred by the vendors, promote everyone's success in the HSD market, and previously the Commission found them appropriate. The Commission stated in no uncertain terms: "The carriers' claim that their national advertising is directed to all customers and thus benefits distributors by enhancing customer awareness of the programming has validity.... Part of the cost of advertising and promotion is therefore appropriately allocated to serving distributors as well as individual customers."6/ The

NRTC's renewed effort to eliminate costs-based differentials should be rejected.

IV. The Commission Correctly Noted That Damages Are Not An Appropriate Remedy.

NRTC argues that the Commission should expressly include a damage remedy for cases where a complainant establishes a prima facie case of discrimination. Although the Commission correctly found that in most cases, amendments to the agreement will be the appropriate remedy, NRTC argues that because damages for violation of Title II's anti-discrimination provisions can be awarded the Commission should award damages here. NRTC's argument is misleading.

First, Congress did not direct the Commission to employ Title II remedies. Although Congress authorized the Commission to order "appropriate" remedies including the power to establish prices, terms and conditions, 47 U.S.C. § 628(e)(1), Congress granted authority to the Commission to utilize only those "additional" remedies available under Title V or any other provision of this act. 47 U.S.C. § 628(e)(2). Because none of the program vendors are "common carriers" subject to Title II, none of Title II's damage remedies are "available."

Second, assessing damages in a Title II common carrier discrimination proceeding is vastly different from assessing

damages under Section 19. In common carrier proceedings, with tariffs or rate cards, it is far easier to assess price differentials. But even in common carrier proceedings, damages are not calculated as the difference between the rates charged the complaining distributor and similarly situated competing distributor. The "difference between one rate and another is not the measure of damages..."[9/] The actual measure of damages in a common carrier proceeding is limited to the particular profits which are lost due to customers subscribing to a competitor's service.[10/] NRTC, on the other hand, wants the distributor to be able to recover "unfair payments" of discriminatory rates. Because price differentials are not awarded as damages, NRTC's entire position on damages is without merit.

Moreover, refusing damage awards makes eminent sense. Here, the cable and HSD services are "unlike" ("likeness" being another prerequisite for recovery in a common carrier proceeding) and it would be purely speculative to assume that the price of programming charged to a distributor alone caused a customer not to subscribe to a particular technology for delivery of programming.[11/] Accordingly, awarding damages -- even as "lost

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9/ I.C.C. v. United States, 289 U.S. 385, 389 (1933); Illinois Bell Telephone Co. v. American Telephone and Telegraph Co., 66 RR2d 919, n. 13 (1989).

10/ I.C.C., 289 U.S. at 390.

11/ Common carriers are only liable for damages for discrimination in connection with "like services." 47 U.S.C.

[Footnote Continued Next Page]

profits" -- would be purely speculative and not based on any business or market evidence. More likely, a damage remedy would have the in terrorem effect of multiple complaints against multiple programmers forcing a settlement regardless of entitlement to lower rates. The Commission should reject NRTC's position.

V. Only "Aggrieved" Complainants May Bring Actions For Violation of The Commission's Implementing Regulations

Section 19 of the 1992 Cable Act required the Commission to prescribe "minimum" regulations relating to, inter alia, discrimination in prices, terms or conditions for the sale of programming. Because Subsection (c), 47 U.S.C. § 628(c), pursuant to which the Commission promulgated its regulations, provides

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[Footnote Continued]

§ 202(a). The delivery of signals to cable operators is not "like" the service provided to HSD distributors who simply authorize billing, and collect for services that carriers directly provide to HSD owners. Cable operators receive an uncopyrighted signal, subject to Syndex requirements for redelivery to their subscribers. Satellite programmers neither can, nor do, control that delivery process. On the other hand, HSD distributors are simply provided access to an authorization data stream separately uplinked and then combined with copyrighted programming not subjected to Syndex, which the carrier controls and delivers the individual HSD owners. The fact that an HSD owner and cable subscriber ultimately may turn on their television and view the same superstation does not make the service provided further up the distribution chain "like" any other service. Service to HSD distributors exists for a "distinctly different service meeting distinctly different needs for distinctly different sets of customers." In the Matter of AT&T Communications, 5 FCC Rcd. 298, 301 (1990).

that these regulations will "specify particular conduct that is prohibited by Subsection (b)," the Commission's regulations may only prohibit that conduct which, consistent with Subsection (b) has the "purpose or effect" of hindering significantly or preventing a multi-channel video programming distributor from providing programming to subscribers or consumers. Report and Order, ¶ 46. However, the Commission wrongly found that complainants alleging violations of the regulations issued pursuant to Subsection (c), and implementing Subsection (b), need not show harm. Liberty and Viacom have both petitioned for reconsideration on this issue and, in connection with the damage issue raised by NRTC, the Commission should require that complaining distributors make a minimum threshold showing of harm.

Initially, there is no question that for a party to commence an administrative proceeding, it must suffer an injury expressly protected by the underlying statute. The injury which Section 19 of the 1992 Cable Act seeks to prevent is one resulting from conduct that significantly hinders or prevents a complainant from selling programming. Unless a complainant can show that the alleged discriminatory term or condition has caused such competitive harm, that complainant would have no standing to bring an administrative complaint.

Indeed, Section 19 confirms Congress' intent and is consistent with this general proposition. Section 19 provides

that a "multichannel video programming distributor aggrieved by conduct that it alleges constitutes a violation of Subsection (b), or the regulations of the Commission under Subsection (c) may commence an adjudicatory proceeding at the Commission". 47 U.S.C. § 628(d) (emphasis added). Unless the Commission adheres to Section 628(d) and only processes those complaints demonstrating actual harm -- e.g., lost business -- the Commission will be overwhelmed with petty and improper complaints that, despite the protections against frivolous filings, will nonetheless cause significant harm to the programmers.12/

Similarly, the Commission in its Report and Order concluded that complainants must give programmers a reasonable time to negotiate after being notified of the distributor's intent to file a complaint.13/ The Commission's rules do not include this item and it should be added.14/ At a minimum the Commission should allow thirty days to complete negotiations, as it is expected that there will be a significant number of complaints filed, and it is unreasonable to expect programmers to negotiate

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12/ As set forth in Part II, infra, complainants alleging discrimination on the part of a superstation programmer should be required to allege harm before being allowed to pursue its complaint.

13/ Report and Order at n. 101. The Commission stated that the distributor must give ten days to respond to the notice and allow reasonable time thereafter for negotiations.

14/ Liberty Petition at 13, n. 2.

all these in any short timeframe. Accordingly, Rule 1003(a) should be amended to provide that, after a programmer responds to the notice, the distributor must then allow an additional thirty days for negotiations before filing a complaint.

VI. The Commission Should Strengthen The Protections For Confidential Information

A number of commenters have petitioned for reconsideration, asking the Commission to strengthen the protections

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programming contracts,[16/] as well as NRTC's subsequent request for cost and financial information.[17/] Accordingly, Superstar agrees with both the petitioners that production of confidential business information should be limited to only the attorneys of

existing contracts from the rules. At a minimum, the Commission should confirm that discrimination claims under existing contracts can only be remedied by amendment and not by any monetary sanctions or damages. Otherwise, complainants could refuse negotiations and force programmers to defend the terms in existing contracts, and thereby abuse the complaint process. The Commission should thus make it clear with respect to existing contracts, prospective amendment is the only available remedy.

CONCLUSION

Superstar clearly has no incentive to discriminate against any distributor. Developing the HSD market was Superstar's intent from the moment it helped create the HSD market for satellite programming. Indeed, expanding the universe of subscribers -- not limiting it -- is the economic motive behind every contract and condition proposed and adopted by Superstar. Superstation carriers are naturally constrained by the ease of entry, the number of potential entrants, as well as competition from competing superstation programming services. It is the lack of any discernable motive to choke growth in the HSD market that merits more lenient treatment of the superstation carriers with regards to their programming practices. Moreover, the Commission should refuse to award damages and simply modify contracts prospectively. Otherwise, the fear of large damage recoveries unrelated to any expected or predicted harm will force carriers

to succumb to all complaining distributors. Superstation programmers face competition at the program creation and distribution levels of their business. There is no reason why Superstar -- and similarly situated programming vendors -- should be further constrained by regulation. NRTC's petition should be denied and the program access rules clarified as set forth herein and in the other programmers' petitions.

Respectfully submitted,

[redacted]

CERTIFICATE OF SERVICE

I, Judith Easterday, hereby certify that I have mailed, postage prepaid, a copy of the foregoing Opposition of Superstar Connection to Petition for Reconsideration to the following:

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